

NO. 41828-2-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY ca  
DEPUTY

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ROY STEVEN JORGENSEN,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF COWLITZ COUNTY

Before the Honorable James Stonier, Judge, and Gary B. Bashor,  
Judge Pro Tem

OPENING BRIEF OF APPELLANT

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**A. SUMMARY OF APPEAL**

Appellant Roy Jorgenson appeals his two convictions for unlawful possession of a firearm in the second degree. The appellant submits that RCW 9.41.040(2)(a)(iv), which criminalizes a possession of a firearm for persons free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense, unconstitutionally violates the right to bear arms under the Second Amendment to the United States constitution and article I, § 24 of the Washington constitution.

**B. ASSIGNMENTS OF ERROR**

1. The trial court erred when it entered the following Conclusion of Law:

This court finds and concludes beyond a reasonable doubt that on November 25, 2008, in the County of Cowlitz, State of Washington, the Defendant possessed two firearms, one 9mm Tokorov handgun and one Olympic Arms AR-15 rifle, while free on bond pending trial for a serious offense as defined in RCW 9.41.010, contrary to RCW 9.41.040(2)(a)(iv).

2. The trial court erred when it entered the following verdict on Submission of Stipulated Facts:

As to Count I of the information charging the Defendant with Unlawful Possession Of A Firearm in the Second Degree, one 9 mm Tokorov handgun contrary to RCW 9.41.040(2)(a)(iv), the Court finds the Defendant, GUILTY.

3. The trial court erred when it entered the following verdict on Submission of Stipulated Facts:

As to Count II of the information charging the Defendant with Unlawful Possession Of A Firearm in the Second Degree, one Olympic Arms AR-15 rifle contrary to RCW 9.41.040(2)(a)(iv), the Court finds the Defendant, GUILTY.

4. The trial court erred in finding Mr. Jorgenson guilty in Section 2.1 of the Judgment and Sentence.

5. The trial court erred in denying Mr. Jorgenson's motion to dismiss the charges.

6. RCW 9.41.040(2)(a)(iv) is an unconstitutional violation of the Second Amendment of the United States Constitution.

7. RCW 9.41.040(2)(a)(iv) is an unconstitutional violation of Article 1, § 24 of the Washington Constitution.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in not dismissing the charges where RCW 9.41.040(2)(a)(iv) is an unconstitutional violation of the Second Amendment of the United States Constitution and Article 1, § 24 of the Washington Constitution because it criminalizes possession or ownership of a firearm where a defendant is charged with a serious offense and released on

bond or personal recognizance but not convicted of the pending charge?

Assignments of Error No. 1, 2, 3, 4, and 5.

2. The right to possess a firearm is a fundamental individual right guaranteed by both the Second Amendment and the more protective reach of Article I, section 24. The second degree unlawful possession of a firearm statute unduly burdens the right to bear arms in that it criminalizes and imposes a severe penalty for mere ownership of a firearm from the moment a person is accused of a serious offense and released on bond or personal recognizance. At the time of the framing of our Constitution, the right to possess a firearm could not be denied based on an accusation of a offense. Is the statute in violation of the Second Amendment and the Washington constitutional rights to bear arms ? Assignments of Error No. 6 and 7.

#### **D. STATEMENT OF THE CASE**

##### **1. Procedural facts:**

Roy Jorgensen was contacted by Cowlitz County deputies and officers from the Woodland Police Department while he was standing outside his car in Woodland, Washington on November 25, 2008. Clerk's Papers [CP] 67. Stipulation of the Parties at 3. He was contacted by the deputies following a report of the discharge of a firearm. CP 67. Mr. Jorgenson told



the officers that he had two weapons in his vehicle. Deputies saw a rifle inside the vehicle. CP 67.

The police were aware that Mr. Jorgensen had previously been released on bond pending trial for first degree assault.<sup>1</sup> CP 67. Mr. Jorgensen was placed under arrest for unlawful possession of a firearm in the second degree. CP 67. Police obtained a warrant and searched the car on November 26, 2008, and found a handgun and a rifle. CP 67. Both firearms were tested and found to be operable. CP 67.

The Cowlitz County Prosecuting Attorney charged Mr. Jorgensen by Information with two counts of unlawful possession of a firearm in the second degree. CP 3-4.

Prior to trial, counsel moved to dismiss the charges on the basis that Mr. Jorgensen was misled by court action into thinking that he was eligible to possess firearms after he was charged with first degree assault, that the statute violates equal protection, and that it is unconstitutionally overbroad. Report of Proceedings [RP] at 74-124. The court initially denied the motion, but subsequently requested additional briefing on the issue of equal protection. RP at 131-32, 150. The court heard further argument and the motion for dismissal on equal protection grounds was again denied. RP at 171-72.

Mr. Jorgenson waived trial by jury and agreed to entry of stipulated facts to enable the court to decide the charges of second degree unlawful possession of a firearm on the stipulated facts.<sup>2</sup> The court found Mr. Jorgenson guilty of two counts of second degree unlawful possession of a firearm under RCW 9.41.040(2)(a)(iv). CP 73-84. The court imposed a sentence within the standard range. CP 78.

Timely notice of appeal was filed and this appeal follows.

**D. ARGUMENT**

**1. RCW 9.41.040(2)(a)(iv) IS UNCONSTITUTIONAL BECAUSE IT CRIMINALIZES POSSESSION OF FIREARMS FOR PERSONS WHO HAVE NOT BEEN CONVICTED OF A CRIME BUT INSTEAD MERELY CHARGED WITH A CRIME AND RELEASED ON BOND OR PERSONAL RECOGNIZANCE.**

**a. Standard of Review.**

A court reviews issues of constitutionality *de novo*. *State v. Chavez*, 163 Wn.2d 262, 267, 180 P.3d 1250 (2008) (citing *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004)).

**b. RCW 9.41.040(2)(a)(iv) is unconstitutional under the Second Amendment of the United States Constitution and Article 1, § 24 of the Washington Constitution.**

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<sup>1</sup>Cowlitz County Superior Court Cause Number 08-1-00543-4.

<sup>2</sup>A charge of Driving Under the influence was dismissed.

RCW 9.41.040(2)(a)(iv) is unconstitutional because it violates Mr. Jorgenon's right to bear arms. This statute makes it unlawful for any person who is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense to own or have in his possession a firearm. RCW 9.41.040(2)(a)(iv) unconstitutionally infringes on the right to bear arms protected by both the United States and Washington constitutions.

The statute provides:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

...

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

RCW 9.41.040(2)(a).

**c. The right of an individual to bear arms is a fundamental constitutional right.**

Both the United States and Washington constitutions recognize the right to bear arms. Both constitutional provisions grant the right of the individual citizen to bear arms.

The Second Amendment provides: “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. Const. amend. II.

Washington’s article 1, § 24 is more explicit insofar as it grants the right to “the individual.” Article 1, § 24 of the Washington Constitution provides unequivocally that “[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired.”

**d. The Second Amendment applies to the states.**

Mr. Jorgenson relies on *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L. Ed.2d 637 (2008), in which the United States Supreme Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense in the home, and *McDonald v. Chicago*, — U.S. —, 130 S.Ct. 3020, 177 L. Ed.2d 894 (2010), where the Court held that the Second Amendment right is fully applicable to the states.

In *Heller*, the United States Supreme Court determined there is an individual right to bear arms and, in the process, rejected a collective right conditioned on militia service. “There seems to us no doubt, on the basis of

both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not.” *Id.* at 2799. The *Heller* Court, however, did not answer whether the Second Amendment applies to the states

In June, 2010, the Supreme Court in *McDonald* extended the holding in *Heller* by concluding that “the Second Amendment ... right to possess a handgun in the home for the purpose of self-defense ... applies equally to the Federal Government and the States.” *McDonald*, 130 S.Ct. at 3050.

Presaging the holding of the *McDonald* Court by several months, our State Supreme Court on February 18, 2010 found that the Second Amendment's right to bear arms applies to the states as part of the process due under the Fourteenth Amendment in *State v. Sieyes*, 168 Wn.2d 276, 282, 225 P.3d 995 2010. The *Sieyes* Court found that the Second Amendment's right to bear arms applies to the states as part of the process due under the Fourteenth Amendment. *Sieyes*, 168 Wn.2d at 291. In reaching this conclusion, the Court applied four factors in *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) to determine whether a Bill of Rights provision warrants incorporation to the states through the

Fourteenth Amendment. *Sieyes*, 168 Wn.2d at 284. The Court found, applying the *Duncan* factors,<sup>3</sup> that “the Second Amendment protects an individual right to bear arms from state interference through the due process clause of the Fourteenth Amendment.” *Sieyes*, 168 Wn.2d at 291.

The *Sieyes* Court held:

Pursuant to *Duncan* the Second Amendment protects an individual right to bear arms from state interference through the due process clause of the Fourteenth Amendment. This right is necessary to an Anglo–American regime of ordered liberty and fundamental to the American scheme of justice.

*Sieyes*, 168 Wash.2d at 291.

**e. Article I, § 24 of the Washington Constitution also secures the individual right to keep and bear arms**

Article I, §24 plainly guarantees an individual right to bear arms. *Sieyes*, 168 Wn.2d at 292. The Court held that the individual right to bear arms under article I, section 24 may be broader than the Second Amendment. *Sieyes*, 168 Wn.2d at 292 (citing *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996) (plurality); *State v. Rupe*, 101 Wn.2d 664, 706, 683 P.2d 571 (1984)).

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<sup>3</sup> The *Duncan* factors to determine whether a Bill of Rights provision warrants incorporation are (1) the right's historical underpinning; (2) states' initial regard for the right, particularly in state constitutions; (3) recent trends and popular view regarding the right; and (4) purpose served by the right. *Id.* at 149–58, 88 S.Ct. 1444. *Sieyes*, 168

In *Sieyes*, the Court noted that neither party adequately briefed the *Gunwall* factors<sup>4</sup> and the court declined to decide whether the state constitution provides greater protection in this context.

**f. The state constitutional right to bear arms is broader than the federal constitutional right.**

In an analysis under the criteria set forth in *Gunwall*, indicate the state right is broader than the federal right. In *State v. Spencer*, 75 Wn.App. 118, 876 P.2d 939 (1994), the Court of Appeals addressed the differences in textual language between the state and federal constitutions and concluded, "the Washington Constitution grants a broader right to bear arms than the United States Constitution." *Spencer*, 75 Wn. App. at 122 n.3 (citing *Rupe*, 101 Wn.2d at 706 (state provision is facially broader than federal provision)).

**1. Factors one and two: The textual language of the state constitution and significant differences in the text of the federal and state constitutions.**

The textual language of article 1, § 24 of the Washington Constitution

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Wn.2d at 284.

<sup>4</sup>In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986), the court set forth six factors to consider in determining whether a state constitutional provision affords greater protection than its federal counterpart. The six factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern.

differs from that of the Second Amendment of the United States Constitution.

Article 1, § 24 provides:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

The Second Amendment provides:

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The express language of article 1, § 24 creates an individual right to bear arms for personal protection. The only limitation in article 1, § 24, to the unrestricted right to bear arms as an individual in defense of either self or the state, is a limitation on the right of a group of individuals or corporations to employ an armed body of men. This limitation arose from the historical context in which the amendment was written. The importance of the difference in textual language is supported by the legislative history of the adoption of Article 1, § 24. The drafters of the Washington provision expressly made the right to bear arms an individual right "thus obviating the federal debate regarding whether 'the right of the people' is an individual right or a collective right." Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 39 (2002) (citations omitted). See also

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*Gunwall*, 106 Wn.2d at 61-62.



*Steyes*, 168 Wn.2d at 293. Thus, *Gunwall* factors 1 and 2 support an independent state interpretation of article 1, § 24.

**2. Factor three: state constitutional and common law history.**

The constitutional history contains no support for absolute prohibitions on a person's right to possess a firearm due to an accusation of a crime. See e.g., *State v. Rupe*, 101 Wn.2d 664, 706-07, 683 P.2d 571 (1984).

The United States Constitution was adopted without a Bill of Rights. The Bill of Rights followed as amendments to the Constitution. In Washington, the Bill of Rights is found in Article 1 of the State Constitution.

The sources of the Bill of Rights of the Washington Constitution were fundamental rights derived from other state constitutions whose origins were in pre-revolutionary common law. *State v. Earls*, 116 Wn.2d 364, 391-92, 805 P.2d 211 (1991) (Utter, J. dissenting) (citing Robert J. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 497 (1984); Robert J. Utter, Presenting a State Constitutional Argument: Comment on Theory and Technique, 20 Ind. L. Rev. 635, 635 (1987); Note, Federalism, Uniformity, and the State Constitution--*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), 62 Wash. L. Rev. 569, 569 (1987)).

The language of article 1, § 24 was borrowed in part from the Oregon constitution. *Utter and Spitzer, supra*, at 39. Thus, the fact that Article 1, section 24 was based on other states' constitutions and common law, rather than the federal constitution, supports an independent interpretation of Article 1, § 24.

**3. Factor four: preexisting state law.**

In *Rupe*, 101 Wn.2d at 706, the Court held the right to possess weapons in one's home is part of the right of an "individual citizen to bear arms in defense of himself," and that the right to bear arms under article 1, section 24 is facially broader than the right to bear arms under the federal constitution. See also *Sieyes*, 168 Wn.2d at 292. In *Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996), the Court similarly held that, although subject to reasonable regulation, the constitutional provision plainly prohibits the absolute proscription of firearm possession by any "individual citizen."

As set forth above, in *Spencer*, the Court of Appeals held also that article 1, section 24 is more protective of the individual right to bear arms than the Second Amendment. Thus, pre-existing state law supports an independent state interpretation of article 1, section 24.

**4. Factor five: differences in structure between federal and state constitutions.**

The Supreme Court in *Gunwall* held that this factor always supports construing state constitutional provisions independently. *Gunwall*, 106 Wn.2d at 66-67.

**5. Factor six: matters of particular state interest and concern.**

The United States Supreme Court has noted that considerations of "federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants." *Cabana v. Bullock*, 474 U.S. 376, 391, 88 L. Ed. 2d 704, 106 S. Ct. 689 (1986). Thus, factor 6 favors an independent interpretation of article 1, § 24 in this criminal case.

In sum, the *Gunwall* analysis above indicates the Washington constitutional right to possess firearms is broader than the federal right. Moreover, the broader guarantee set out in article 1, § 24 cannot be squared with the punishment imposed on Mr. Jorgenson for exercising that right.

**f. Washington's statutory restrictions on gun possession for persons accused but not convicted of an offense violates the right to bear arms**

Following *Heller*, the *Sieyes* Court declined to analyze RCW 9.41.040(2)(a)(iii) (the subsection at issue in *Sieyes*), under any level of scrutiny. Instead the Court addressed the Second Amendment's original meaning. *Sieyes*, 168 Wn.2d at 295. The *Sieyes* Court held---following *Heller*---that the threshold inquiry in Second Amendment cases is to determine the issue of “scope.” In other words, is the restricted activity protected by the Second Amendment in the first place? *Sieyes*, 168 Wn.2d at 295 (citing *Eugene Volokh*, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L.Rev. 1443, 1449.)

Following *Sieyes*, the answer requires a textual and historical inquiry into original meaning of the Second Amendment. *Heller*, 554 U.S. at 634–35, 128 S.Ct. 2783 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”); *McDonald*, 130 S.Ct. at 3047 (“[T]he scope of the Second Amendment right” is determined by textual and historical inquiry, not interest-balancing.). *McDonald* confirms that when state or local government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the

Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified. *McDonald*, 130 S.Ct. at 3038–42. Just as some categories of speech are unprotected as a matter of history and legal tradition (obscenity, defamation, fraud, incitement), so too are some issues pertaining to the Second Amendment. *Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified; *McDonald* confirms that if the claim concerns a state or local law, the “scope” question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified. *Heller*, 554 U.S. at 625–28, 128 S.Ct. 2783; *McDonald*, 130 S.Ct. at 3038–47.

Here, Mr. Jorgenson had not been convicted of a serious crime; he had merely been charged with such an offense and released on bond. CP 67. The challenged statute does not require a finding of guilt (or perplexingly, even notice of ineligibility to own or possess firearms, in contrast to RCW 9.41.047, which requires both oral and written notice) of a prior offense or even a finding that Mr. Jorgenson would constitute a threat of violence in the future; it categorically prohibits both possession and ownership of a gun.

The Second Amendment rights of a person accused of a crime and released on bond or personal recognizance are entitled to full solicitude under *Heller*, and the claim implicates the core of the Second Amendment right. Addressing the original intent of the Second Amendment, at the time of the framing of our constitution, not even adult felons were banned from possession of firearms. See C. Kevin Marshall, “Why Can’t Martha Stewart Have a Gun?,” 32 Harv. J.L. & Pub. Policy 695, 707 (2009) (“bans on convicts possessing firearms were unknown before World War I”). A statute that proscribes possession of a firearm by virtue of being accused of an offense is not a historically recognized limitation on the fundamental right to bear arms. It substantially burdens Mr. Jorgenson’s right to possess a firearm, even in self-defense, and its broad prohibition of any firearms possession based on merely being charged with an offense is contrary to both the Second Amendment and Article I, § 24.

To the extent RCW 9.41.040(2)(a)(iv) prohibits a person merely accused of a crime from owning or using a firearm, the statute is an unreasonable limitation of a citizen’s federal and state constitutional rights to bear arms under the Second Amendment and article I, section 24. This is a

serious encroachment on the right to meaningful exercise of the core right to possess firearms for self-defense.

Not only under the Second Amendment as recently clarified by the United States Supreme Court, but by virtue of the broadly guaranteed and historically recognized individual right to possess a firearm guaranteed by Article I, section 24, Mr. Jorgenson was punished by losing his fundamental right to possess a firearm under RCW 9.41.040(2)(a)(iv). He may neither possess a firearm in his home nor in self-defense. The restrictions on pre-conviction possessing firearms unconstitutionally infringe on an individual's state and federal right to bear arms and reversal is required.

**F. CONCLUSION**

Because he was convicted under an unconstitutional provision of the statute and the error is not harmless, Mr. Jorgenson contends this Court must reverse his two convictions for unlawful possession of a firearm in the second degree.

DATED: August 31, 2011.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "P. B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Roy Steven Jorgenson

## EXHIBIT A

### STATUTES

#### ***RCW 9.41.040***

Unlawful possession of firearms — Ownership, possession by certain persons — Penalties.

**\*\*\* CHANGE IN 2011 \*\*\* (SEE 1455.SL) \*\*\***

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);



(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.240, 71.05.320, 71.34.740, 71.34.750, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-fact-finding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4) Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a

probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(a) Under RCW 9.41.047; and/or

(b)(i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(ii) If the conviction or finding of not guilty by reason of insanity was for a nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or

interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROY STEVEN JORGENSEN,

Appellant.

COURT OF APPEALS NO.  
41828-2-II

COWLITZ COUNTY NO.  
08-1-01322-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Appellant's Opening Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Roy Steven Jorgenson, Appellant, and Susan Baur, Deputy Prosecutor, by first class mail, postage pre-paid on August 31, 2011, at the Centralia, Washington post office addressed as follows:

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Cowlitz Co. Prosecutor's Office  
312 SW 1<sup>st</sup> Ave.  
Kelso, WA 98626

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
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CERTIFICATE OF  
MAILING

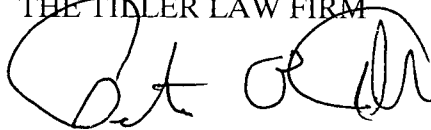
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A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line.

PETER B. TILLER – WSBA #20835  
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